# STATE OF MICHIGAN

# COURT OF APPEALS

PATRICK LENNON and PATRICIA LENNON,

Plaintiffs-Appellees,

v

MICHAEL JOSEPH BILKOVIC and KIM M. BILKOVIC,

Defendants-Appellants.

UNPUBLISHED
February 6, 2007

No. 271243
Wayne Circuit Court
LC No. 05-530668-NO

Before: Borrello, P.J., and Jansen and Cooper, JJ.

PER CURIAM.

Defendants appeal by leave granted from a circuit court order denying their motion for summary disposition pursuant to MCR 2.116(C)(10)[1] in this premises liability action arising from plaintiff Patrick Lennon[2] striking his head on covered ductwork on the ceiling of defendants' finished basement. The trial court rejected defendants' argument that the hazard was open and obvious. We reverse. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Summary disposition may be granted under MCR 2.116(C)(10) when "there is no genuine issue of material fact, and the moving party is entitled to judgment . . . as a matter of law." This Court reviews a trial court's decision on a motion for summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

Invitors[3] are not absolute insurers of the safety of their invitees. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 614; 537 NW2d 185 (1995). "In general, a premises possessor owes a duty

[1] Defendants' motion was also brought under MCR 2.116(C)(8), but defendants relied on evidence beyond the pleadings, so the motion is properly considered under MCR 2.116(C)(10). See *Krass v Tri-County Security, Inc*, 233 Mich App 661, 664-665; 593 NW2d 578 (1999).

[2] The singular term "plaintiff" refers to Patrick Lennon. Patricia Lennon's loss of consortium claim is derivative in nature.

[3] We shall assume, without deciding, that plaintiff was an invitee rather than a licensee while on defendants' premises.

to an invitee to exercise reasonable care to protect an invitee from an unreasonable risk of harm caused by a dangerous condition on the land." *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001) (citation omitted). The duty generally does not encompass warning about or removing open and obvious dangers unless the premises owner should anticipate that special aspects of the condition make even an open and obvious risk unreasonably dangerous. *Id*. at 517. Whether a hazardous condition is open and obvious depends on whether it is reasonable to expect that an average person with ordinary intelligence would have discovered the danger and risk presented upon casual inspection. *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 474-475; 499 NW2d 379 (1993). The determination depends on the characteristics of a reasonably prudent person, not the characteristics of a particular plaintiff. See *Mann v Shusteric Enterprises, Inc*, 470 Mich 320, 329 n 10; 683 NW2d 573 (2004).

Although plaintiffs presented evidence that the height of the ceiling did not comply with building codes, defendants' argument addresses whether they owed a duty to plaintiffs. Building code violations are insufficient to impose a legal duty of care on an invitor. *Summers v Detroit*, 206 Mich App 46; 520 NW2d 356 (1994).

The evidence suggests three potential reasons for rejecting the applicability of the open and obvious doctrine because an average person of reasonable intelligence would not have discovered the hazard and risk posed by the low ceiling upon casual inspection.

First, plaintiff's testimony indicated that the lighting was dim and a beam of light coming through an open doorway compromised his eyes' adjustment to the lighting. However, plaintiff's testimony indicated that the lighting was adequate to enable him to see his friends. If the lighting was adequate to allow him to see the people at the bar, it was adequate for him to see the dropped ceiling that he encountered as he went to greet them.

Second, plaintiffs refer to the blending of the ceiling tile and the covered ductwork. Although both the ceiling and the covered ductwork were white and the ceiling tiles formed a horizontal surface, the vertical surface formed by the front of the covered ductwork is readily apparent.

Third, plaintiff refers to the distraction posed by his friends. But in *Lugo*, *supra* at 522, the Court indicated that the existence of distractions that are not unusual under the circumstances do not provide an exception to the open and obvious danger doctrine. Plaintiff has not established anything unusual about the presence of the homeowner and other guests in the home. Therefore, whether plaintiff was distracted by others is immaterial to the application of the open and obvious danger doctrine.

Plaintiffs contend that there were special aspects of the condition that made it unreasonably dangerous, specifically that the condition was effectively unavoidable because plaintiff had to walk under the ceiling to reach defendant Michael Bilkovic. However, plaintiff could have ducked his head as he passed, waited for Bilkovic to approach him, or left the area entirely and visited in another area. The hazard was not effectively unavoidable as described in *Lugo*, *supra* at 519.

For these reasons, we conclude that the condition of the covered ductwork was open and obvious and the trial court erred in denying defendants' motion for summary disposition. In light

of our decision, we need not address defendants' remaining argument concerning plaintiff's comparative fault under MCL 600.2959.

Reversed.

/s/ Stephen L. Borrello
/s/ Kathleen Jansen